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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

ALLEN DUNLAP,

Petitioner,

v.

A. L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

THE ARKANSAS OBSCENITY LAW VIOLATES THE *MILLER* STANDARD AND THE FIRST AMENDMENT BECAUSE: (A) IT IS VOID FOR VAGUENESS SINCE IT FAILS TO GIVE ADEQUATE NOTICE OF WHAT IS OR IS NOT "OBSCENE" OR GUIDELINES TO LAW ENFORCEMENT TO PREVENT ENFORCEMENT OF THE LAW IN AN ARBITRARY AND DISCRIMINATORY MANNER; (B) IT USES THE PHRASE "PRURIENT INTEREST" WHICH IS UNDEFINED IN THE STATUTE AND NO LONGER HAS ANY SUBSTANTIVE MEANING; AND (C) IT USES AN UNCONSTITUTIONAL DEFINITION OF "PRURIENT INTEREST OF THE AVERAGE PERSON" RATHER THAN LANGUAGE REQUIRED BY *MILLER*.

II.

THE *MILLER* STANDARD FOR OBSCENITY IS NO LONGER WORKABLE AND SHOULD NOW BE RECONSIDERED.

III.

THE ARKANSAS COURTS UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO PETITIONER TO PROVE THAT THE ALLEGEDLY OBSCENE MATERIALS SATISFIED COMMUNITY STANDARDS WITHOUT IMPOSING UPON THE STATE THE BURDEN OF PROVING THAT THE MATERIALS OFFENDED COMMUNITY STANDARDS.

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In the
Supreme Court of the United States

Allen Dunlap,

Petitioner,

v.

A. L. Lockhart, Director
Arkansas Department of Correction,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals was entered on December 18, 1989 and is unreported.

JURISDICTION

The Eighth Circuit decided this case on December 18, 1989. This Petition for Writ of Certiorari is filed within ninety days and is, therefore, timely. The Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, ...

The Fourteenth Amendment to the United States Constitution, § 1, provides in part:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law, ...

STATUTORY PROVISIONS INVOLVED

Ark. Code Ann. § 5-68-303 (1987) provides:

5-68-303. Promoting obscene materials.

(a) Except as otherwise provided in § 5-68-308, a person commits promoting obscene materials if he knowingly promotes, or has in his possession with intent to promote, any obscene material.

(b) As used in this section, "material" means any writing, picture, motion picture, films, slides, drawings, or other visual reproductions.

(c) Promoting obscene materials is a Class D felony.

Ark. Code Ann. § 5-68-302 provides in pertinent part:

5-68-302. Definitions.

As used in this subchapter, unless the context otherwise requires:

(4) "Obscene material" means that material which:

(A) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;

(B) Taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards; and

(C) Taken as a whole, lacks serious literary, artistic, political, or sci-

entific value.

STATEMENT OF THE CASE

Petitioner, Allen Dunlap, is the owner and operator of the American Arcade, an "adults only" retail outlet in Little Rock, Arkansas. On July 18, 1985, he sold an "adult" videocassette movie and an "adult" magazine to a police officer. He was subsequently charged in state court with one count of promoting obscene materials in violation of Ark. Stat. Ann. § 41-3585.2 (Supp. 1985), now Ark. Code Ann. § 5-68-303 (1987). He was also charged in another count under the same statute for selling a soundless "adult" ten minute 8-mm film and an "adult" magazine. On both occasions, petitioner knew he was selling to a police officer and that there was a possibility that he would be prosecuted. The material was

hardcore pornography.[1]

Petitioner filed a pre-trial motion to dismiss the charges on several constitutional grounds. First, he alleged that the Arkansas obscenity law is void for vagueness on its face because it fails to give adequate notice of what is "obscene." Second, he claimed that in light of the increased availability and tolerance of sexually explicit material, the

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[1] As in *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916, 932 (1989) (Stevens, J., concurring in part and dissenting in part):

> Petitioners are accused of selling to the same willing purchaser three obscene magazines in each of two stores. There is no charge that anyone engaged in any sexual misconduct on petitioners' premises, that petitioners displayed or advertised their inventory in an offensive way, that children were given access to any of their publications or films, or that they foisted any obscene messages upon unwilling recipients. There is no claim that petitioners' bookstores are public nuisances operating in inappropriate places, manners, or times. (footnotes omitted)

law is void for vagueness as applied because it fails to provide guidelines to law enforcement and thus permits enforcement and prosecution in an arbitrary and discriminatory manner. Third, he argued that the law is void for vagueness because of its use of the phrase "prurient interest" which is undefined and no longer has any substantive meaning. Fourth, he claimed that the language of the statute fails to comply with *Miller v. California*, 413 U.S. 15, 24 (1973) for two reasons: (a) because it uses the phrase "prurient interest of the average person" which deviates from the language of *Miller* and which in fact makes no sense at all, and (b) because the way the statute reads, "obscene material" is defined as a "patently offensive depiction done in a patently offensive manner," which is circular and incapable of understanding

by juries. Fifth, he argued that in light of *Pope v. Illinois*, 107 S.Ct. 1918 (1987), and *Kolender v. Lawson*, 461 U.S. 352 (1983), the continued viability of the *Miller* standard should be reconsidered and the standard replaced with a more workable definition. Sixth, he argued that the procedure by which obscenity cases in Arkansas are tried is unconstitutional because it places the burden of proof upon the defendant to show that the material meets with community standards without obligating the State to put on any proof at all relative to that issue.

All of the claims for relief were rejected by the Arkansas state courts. At trial, petitioner presented the testimony of two Little Rock clinical psychologists, Dr. Douglas Stephens and Dr. James Moneypenny. Both testified that sexually explicit materials similar to the ones

for which petitioner was on trial were commonly recommended by therapists in sex therapy; that the subject matter and scenes portrayed in the materials were not uncommon fantasies for normal persons; and that in their opinion, there is no such thing as a "prurient interest of the average person." Petitioner also made an offer of proof which showed that the materials for which he was being prosecuted were readily available at numerous video outlets in the geographic area. Petitioner was convicted, and it was affirmed on appeal. *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, *cert. denied*, 108 S.Ct. 155 (1987).

Petitioner reasserted all his constitutional arguments in his habeas petition, filed April 4, 1988. On October 21, 1988, the district court rejected all arguments. The court held that it was bound

to follow *Miller*; that the Arkansas statute falls within the limits prescribed by *Miller*; and that the record did not support the contention that attitudes have changed since *Miller* or that the availability of sexually explicit materials has increased since *Miller*. It further held that the statute is not void for vagueness as applied because, unlike the statute in *Kolender v. Lawson*, 461 U.S. 352 (1983), the Arkansas statute specifically defines what is "obscene." The court found that the jury in petitioner's case was given an instruction which accurately embodied the judicially accepted definition of "prurient interest" (a "shameful or morbid interest in nudity, sex or excretion"), and that the statute substantially tracked the *Miller* standard in its definition of what is "obscene." It refused to reconsider the *Miller* standard.

Finally, it held that since the material at issue speaks for itself, petitioner was not unconstitutionally saddled with the burden of proving community standards.

The Eighth Circuit affirmed in a three paragraph *per curiam* opinion on December 18, 1989, saying only that it was bound to follow *Miller* and the district court's opinion was "clearly correct." *Dunlap v. Lockhart*, No. 88-2724 (8th Cir., Dec. 18, 1989).

REASONS FOR GRANTING THE WRIT

I.

THE CONSTITUTIONALITY OF THE ARKANSAS OBSCENITY LAW IS AN IMPORTANT QUESTION WHICH SHOULD BE DECIDED BY THIS COURT.

A. The Arkansas obscenity law violates the *Miller* standard and the First Amendment because it is void for vagueness since it fails to give adequate notice of what is or is not "obscene" or guidelines to law enforcement to prevent enforcement of the law in an arbitrary and discriminatory manner.

Ark. Code Ann. § 5-68-303 (1987) provides:

5-68-303. Promoting obscene materials.

(a) Except as otherwise provided in § 5-68-308, a person commits promoting obscene materials if he knowingly promotes, or has in his possession with intent to promote, any obscene materi-

al.

(b) As used in this section, "material" means any writing, picture, motion picture, films, slides, drawings, or other visual reproductions.

(c) Promoting obscene materials is a Class D felony.

Section 5-68-302 also provides in pertinent part:

5-68-302. Definitions.

As used in this subchapter, unless the context otherwise requires:

(4) "Obscene material" means that material which:

(A) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;

(B) Taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards; and

(C) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

The courts below[2] determined that since the Arkansas obscenity law falls within the limits prescribed in *Miller v. California*, 413 U.S. 15 (1973), it gives ade-

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[2] The Eighth Circuit essentially adopted the reasoning of the district court as its own.

quate notice of what is obscene. They further held that since the Arkansas law specifically defines obscene material, it does not unconstitutionally vest law enforcement officers and prosecutors with unbridled discretion to determine what is prohibited. This was constitutionally wrong.

In *Miller, supra*, at 24 a majority of this Court set forth its definition of obscenity as follows:

> The basic guidelines for the trier of fact must be (a) whether "the average person, applying contemporary community standards" . . . would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value (citations omitted).

The Court then gave examples of what it meant by "sexual conduct specifically defined by the applicable state law"

under part (b) of the definition, *id.* at 25:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals.

The thrust of the majority opinion in *Miller* was that a clearly identifiable class of "hardcore pornography" exists that is easily recognizable by dealers, law enforcement authorities, courts, and juries; and that the inherent vagueness of the definition of obscenity poses difficulties only in "marginal cases."

In discussing the issue of vagueness, the *Miller* majority focused only upon one aspect of the void for vagueness doctrine: that a statute is vague if it fails adequately to inform persons subject to its provisions of what conduct is forbidden. The *Miller* majority did not

discuss the second aspect of the vagueness doctrine: that a vague law invites arbitrary, erratic, and discriminatory enforcement of the law. This second aspect is even more important than the first aspect. *See Kolender v. Lawson*, 461 U.S. 352 (1983).

In light of *Kolender* and other post-*Miller* decisions, it is petitioner's position that the assumption by the Court in *Miller* that it would be relatively easy for law enforcement authorities, courts, and juries to determine what is "hardcore pornography" and what is not, has simply not proven to be accurate. This is especially evident because since 1973, sexually explicit films and magazines have achieved a widespread level of acceptability. Adults in every community across the nation can and do view sexually explicit films in the privacy of their

homes, films which are openly advertised in magazines of national circulation and effortlessly acquired either through the mail, respected "non-adult" retail outlets, on pay cable television, by satellite, or by "dial-a-porn" (*Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829 (1989)). "[Sexually oriented] businesses flourish throughout the country as they never did before, not only in New York's Times Square, but in much smaller communities from coast to coast." *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 618 (1990) (Scalia, J., concurring in part and dissenting in part). This was not the norm seventeen years ago when *Miller* was decided. Home videocassette recorders, the videotape explosion, pay cable, dial-a-porn and satellite dishes were unheard of in 1973.

The result of these changes is that the

mere fact that material is in the nature of "hardcore" no longer necessarily means that it is "obscene." There is now a much greater public tolerance for sexually explicit material which did not exist in 1973. It also leads to the conclusion that the sporadic prosecution of individuals possessing or promoting such materials must be initiated for essentially arbitrary reasons.

Because societal attitudes have changed since 1973, the *Miller* test for obscenity is no longer workable. Indeed, under the *Miller* test, all obscenity cases are now "marginal." This conclusion is supported by the fact that the verdict of a judge or jury in an obscenity case, no matter how "hardcore" the material is, cannot be predicted in advance.[3] A decision by

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[3] This is demonstrated by the fact that in a companion case which was tried together with the one forming the basis

a prosecutor to initiate an obscenity prosecution can only be considered as arbitrary because it is based upon his own personal views as to whether the material is obscene. A prosecutor's

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for this habeas action, the jury could not reach a verdict on a count involving a ten minute 8mm. film with no sound or plot. *State v. Dunlap*, Pulaski County Circuit No. CR 85-1325. A mistrial was declared on that count, and the state nolle prossed it.

In addition, petitioner's second criminal case in 1988 also resulted in a hung jury, but that time 9-3 for acquittal, involving substantially similar hard-core materials. Pulaski County Circuit Court No. CR 88-707. Petitioner testified in that trial that he sought guidance from police and prosecutors, and he did not get any. He also testified that he screened his material to exclude that which he thought prosecutors and police would object and complained that he was being prosecuted in that case after seeking guidance. On retrial he was convicted, and the jury gave him six years in prison and a $10,000 fine. That conviction is on appeal to the Arkansas Supreme Court because of the issues raised here and an evidentiary issue because the state decided to use one different videotape on the retrial which was not charged in the information, in effect amending the information in the midst of trial.

decision to charge a certain film or magazine as obscene necessarily must be based upon factors having nothing to do with the characteristics of the work itself, and erratic and arbitrary enforcement of the obscenity laws is the inevitable result of the inherent vagueness of the standards for defining obscenity and the widespread availability and tolerance of sexually explicit material by the American public.

There is simply no way for even the most conscientious prosecutors to avoid making an arbitrary decision whether or not to commence a case under the Arkansas obscenity law. This is so because it is impossible to make an objective determination that the material is probably obscene by referring to what the "average person" would conclude. Simply stated, it is entirely possible for two "average

persons" to have totally inapposite opinions about a certain "hardcore" or "softcore" magazine or film. The same is true with regard to the "patent offensiveness" and "serious value" components of the *Miller* test.

In sum, because of the inexorable process of social evolution, the *Miller* test no longer provides prosecutors with any meaningful guidance in determining what should be prosecuted and what should not. Such decisions in obscenity cases are now made at the whim of the prosecuting authorities,[4] and this runs contrary to the

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[4] *See* note 3, *supra*.
Also, an obscenity prosecution was recently initiated in Cleburne County, Arkansas against the manager of a convenience store for selling *Playboy, Penthouse,* and 22 other magazines depicting only nudity. *State of Arkansas v. McGough*, Cleburne County, Ark. No. CR-89-147. Some of the magazines did not even contain any full nudity. The prosecutor there has publicly proclaimed their obscentiy, notwithstanding this Court's holding in *Jenkins v. Georgia*, 418 U.S.

second purpose behind the void for vagueness doctrine as discussed by the Court in *Kolender*. The inherent vagueness and utter subjectivity of the standards for determining obscenity, coupled with the widespread availability and tolerance of "hardcore" erotica compel the conclusion that obscenity statutes such as Arkansas', which somewhat track the *Miller* standard, can be enforced only in an erratic, arbitrary, and discriminatory manner. No principled basis in law exists for a prosecutor's decision to charge or not charge as obscene any particular film or magazine containing explicit sexual material. Such statutes are only sporadically enforced, as is evidenced from the widespread availability of material which is identical to that for which petitioner was convicted.

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153 (1974).

This Court can take judicial notice of the current widespread availability and acceptability of sexually oriented materials in 1989 or 1990 which was not available or acceptable in 1973. Moreover, the fact that Arkansas obscenity law gives a definition for what is "obscene material" does not end the inquiry: in making the decision whether to prosecute under § 5-68-303, it is still left to the unfettered discretion of prosecutors to decide whether the material at issue depicts or describes certain conduct in a "patently offensive manner," whether the material appeals to the "prurient interest of the average person," and whether the material "lacks serious . . . value." *Compare* the case discussed in note 4, *supra*.

What is the difference between the discretion vested in the law enforcement

officer to determine what is "credible and reliable" and the discretion vested in the prosecutor to determine what is "patently offensive" or "appeals to the prurient interest"? There is none. The Arkansas obscenity law is void for vagueness, both on its face and as applied, and certiorari should be granted to decide this question.

B. The Arkansas obscenity law is unconstitutional because it uses the phrase "prurient interest" which is undefined in the statute and no longer has any substantive meaning.

Ark. Code Ann. § 5-68-302(4)(B) (1987), requires that the material at issue "appeal[] to the prurient interest of the average person . . ." in order to be obscene. However, over the years and over the history of obscenity litigation, the

definition of "prurient interest" has changed in its common usage. Shamefulness or morbidness was once the definition, but it is no longer. *See J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 491 (9th Cir. 1984), *aff'd in part and rev'd in part on other grounds sub nom. Brockett v. Spokane Arcades*, 472 U.S. 491 (1985).

The lay person who tries to determine what "prurient" means in order to determine whether the material he proposes to distribute is obscene will get no definition from the Arkansas statute. When he reads the dictionary, he finds a definition that includes such vagaries as "lascivious" or "lustful," which are normal human responses. No one defines "prurient" as "a shameful or morbid interest in sex" except a handful of lawyers who know that it is a word of art which has

no meaning whatsoever to those lawyers practicing outside of this area of First Amendment law.

Psychologists also have determined the term "prurient" to be a nonsequitur because the average person does not have a "shameful or morbid interest in sex." Petitioner's experts so testified in state court here, and their testimony went unrebutted. How can it be said that an ordinary person has actual notice of what conduct is prohibited when people cannot agree on what the words mean that are used to define the crime? The use of the phrase "prurient interest of the average person," which no longer has an easily ascertainable meaning to ordinary people (if it ever did), creates a fatal vagueness in the Arkansas obscenity statute.

The jury in petitioner's case was in-

structed that "prurient interest" means a "morbid, sick or shameful interest in sex, as distinguished from a normal interest in sex." But what is a "shameful interest" in sex? What is a "normal interest" in sex? By using one vague term or phrase to define another, the Arkansas obscenity law, like many other state obscenity statutes that define "prurient interest" in such a manner, has us entangled in a hopeless web of vagaries. It is void for vagueness. Certiorari should be granted to decide this question.

C. THE ARKANSAS OBSCENITY LAW USES AN UNCONSTITUTIONAL DEFINITION OF "PRURIENT INTEREST OF THE AVERAGE PERSON" RATHER THAN LANGUAGE REQUIRED BY *MILLER*.

Aside from the vagueness problem of ob-

scenity statutes in general, the Arkansas obscenity statute has two constitutional defects even under *Miller*: (1) The statute uses the phrase "prurient interest of the average person" and not "the average person, applying contemporary community standards would find that the work appeals to the prurient interest"; and (2) the statute defines "patently offensive" by itself creating a fatal ambiguity under *Miller*.

1. *Miller* requires in its first prong that "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest." *Miller*, *supra*, at 24. The Arkansas statute, however, uses "prurient interest of the average person." § 5-68-302(4)(B). These are two entirely different concepts.

The testimony of Drs. Moneypenny and Stevens at trial showed that there is no such thing as "prurient interest of the average person" because the average person harbors no prurient interest. *See J.R. Distributors, Inc. v. Eikenberry, supra*, 725 F.2d at 490 (expressly refusing to equate the term "lust" with "prurient interest"). Prurient interest is something held by a person with an abnormal or shameful interest in sex, and the average person has a normal, healthy interest in sex. This is clearly not what the Court intended when it set the *Miller* standard. *Brockett v. Spokane Arcades*, 472 U.S. 491, 498-99 (1985).

The jury here was instructed over objection that "'prurient interest' is a morbid, sick, or shameful interest in sex of the average person, as distinguished from a normal interest in sex." (T.416)

Thus, the phrase "prurient interest of the average person" was defined to the jury as the "morbid, sick, or shameful interest in sex, as distinguished from a normal interest in sex of the average person." This instruction, based entirely on the Arkansas statute, makes no sense at all to ordinary persons, and it is impermissibly vague under *Miller* and *Kolender*. Also, the twisting of the prurient interest standard in the Arkansas statute makes it unconstitutional under *Miller*.

2. To compound the vagueness problem just discussed, the statute uses a circular definition in defining obscene materials which also makes it void for vagueness.

"Obscene material" is defined in § 5-68-302(4)(A) as material which "depicts or describes in a patently offensive man-

ner ... hardcore sexual conduct." "Hardcore sexual conduct" is defined in § 5-58-302(2) as "patently offensive . . . depictions of [*e.g.*, intercourse]." Thus, "obscene material" is defined in the Arkansas statute as *a patently offensive depiction done in a patently offensive manner*. Now, what is that supposed to mean? What is "patently offensive" supposed to mean? This circular definition requires an actor and a jury to define the qualifier "patently offensive" by the qualifier itself.

Ordinary persons necessarily would differ as to the meaning of this phrase. It thus fails *Kolender* void-for-vagueness scrutiny, and certiorari should be granted to review this question.

II.

THE *MILLER* STANDARD FOR OBSCENITY IS NO LONGER WORKABLE AND SHOULD NOW BE

RECONSIDERED.

Petitioner challenged the *Miller* standard at his trial and below, and the challenge was rejected at all levels. Between the time of the decision of the Arkansas Supreme Court and the filing of the habeas petition, this Court decided *Pope v. Illinois*, 107 S.Ct. 1918 (1987). The courts below nevertheless refused to address the continued viability of *Miller*. Moreover, in applying *Miller*, the courts below acted contrary to the decisions of other courts of last resort.

Pope demonstrates that *Miller* should be re-examined in favor of a new standard that is easier to understand and apply by potential defendants, police, prosecutors, judges, and juries and would remove nearly all subjectivity from obscenity law enforcement and adjudication. *Pope* was a 5-1-3 decision. The tenor of the

dissents and concurrences show that at least four Justices of this Court recognize that the *Miller* standard is no longer viable.

A.

The *Miller* standard is subjective and hopelessly vague.— The *Miller* standard, petitioner submits, fails to satisfy the void-for-vagueness standard of *Kolender v. Lawson*, 461 U.S. 352 (1983), decided ten years later.

In *Kolender* this Court held unconstitutionally vague a California statute requiring persons who loiter or wander on the streets to account for their presence when requested to do so by a police officer. That statute was held to be impermissibly vague because it failed to clarify what was contemplated by the requirement that a suspect provide a "credible and reliable" identification, thus leav-

ing that determination up to the subjective judgment of law enforcement authorities. The Court stated, *id.* at 358:

> Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith* [*v. Goguen*], 415 U.S. at 574.

The Court quoted with approval, *id.* at 358 n.7, the 1875 decision in *United States v. Reese*, 92 U.S. 214, 221:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

The *Kolender* Court pointed out that the discretion accorded to the police to determine who was in violation of the law encouraged arbitrary enforcement. *Id.* at 360-61. *And see id.* at 360:

> [I]t necessarily "entrust[s] lawmaking to the moment-to-moment judgment of the

> policeman on his beat'" . . . "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,'" . . . and "confers on police a virtually unrestrained power to arrest and charge persons with a violation." (citations omitted)

The rationale and holding of *Kolender* applies to obscenity litigation and calls into question the standardless sweep of any statute based on *Miller*. Justice Brennan's dissent in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 70 (1973), decided with and applicable to all five cases in the *Miller* series, emphasized the capriciousness of obscenity law enforcement, and properly analyzed the vagueness issue in light of *Kolender*.

This vagueness issue has been repeatedly emphasized in dissenting opinions since then. *See Smith v. United States*, 431 U.S. 291, 310 (1977) (Brennan, J., dissenting); *id.* at 315-16 (Stevens, J.,

dissenting)[5]; *Sewell v. Georgia*, 435 U.S.

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[5] "The question of offensiveness to community standards, whether national or local, is not one that the average juror can be expected to answer with evenhanded consistency. The average juror may well have one reaction to sexually oriented materials in a completely private setting and an entirely different reaction in a social context. Studies have shown that an opinion held by a large majority of a group concerning a neutral and objective subject has a significant impact in distorting the perceptions of group members who would normally take a different position. Since obscenity is by no means a neutral subject, and since the ascertainment of a community standard is such a subjective task, the expression of individual jurors' sentiments will inevitably influence the perceptions of other jurors, particularly those who would normally be in the minority. Moreover, because the record never discloses the obscenity standards which the jurors actually apply, their decisions in these cases are effectively unreviewable by an appellate court. In the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law.

"This conclusion is especially troubling because the same image--whether created by words, sounds, or pictures--may produce such a wide variety of reactions. As Mr. Justice Harlan noted: [It is] often true that one man's vulgarity

982, 985-88 (1978) (Brennan, J., dissenting from denial of certiorari). Most recently, four members of the Court noted in *Pope v. Illinois*, 107 S.Ct. 1918 (1987), that the *Miller* standard should be changed. Justices Stevens, Brennan, and Marshall observed that obscenity laws cannot be applied to consenting adults. *Id.* at 1924 (dissenting opinion). Justice Scalia, concurring, noted that the fractured opinions of the Court "display a need for re-examination of *Miller*." *Id.* at 1923 (Scalia, J., concurring).

Justice Blackmun's concurring and dis-

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is another's lyric. Indeed, we think it is largely because government officials [or jurors] cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. 15, 25. In my judgment, the line between communications which "offend" and those which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment." (footnotes omitted)

senting opinion did not address this issue, but he noted that "a majority [should not] dictate to discrete segments of the population what material has value" under the *Miller* standard. *Id.* at 1924 (Blackmun, J., concurring and dissenting). *See Miller, supra* at 34 ("The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.").

The *Miller* standard now does just that, and it is no longer working as the Court originally intended, if it really ever did. The "prurient interest" and "patently offensive" standards have lost any meaning that the Court once thought they had.

The law has come full circle since

Justice Stewart's concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), that he could not define what was obscene, "[b]ut I know it when I see it . . . ."

The subjectivity in this case is apparent from the fact that the jury in petitioner's trial deadlocked on a count involving material that had the slimmest of plot line and little if any serious literary or artistic value at all. *See* note 2, *supra*. It appears that having themes in the material caused the conviction here. This typifies the *Kolender* vagueness and arbitrariness problem in obscenity prosecutions.

B.

The community standards test of *Miller* was interpreted at petitioner's trial as foreclosing defense reference to "community tolerance" as it relates to "com-

munity standards."[6] The Arkansas courts' denying petitioner the opportunity to litigate community tolerance is contrary to decisions of state and federal courts on this same issue. *See, e.g., Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1029 (5th Cir. 1981), *cert. denied*, 455 U.S. 913 (1982); *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 360-61 (Colo. 1985); *Leech v. American Booksellers Association, Inc.*, 582 S.W.2d 738, 748 (Tenn. 1979). *See also Home Box Office, Inc. v. Wilkinson*, 531 F.Supp. 987, 1001 (D. Utah 1982); *Community Television of Utah, Inc. v. Roy City*, 555 F.Supp. 1164, 1171-72 (D. Utah 1982);

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[6] In petitioner's 1988 trial on another obscenity charge, *see* note 2, *supra*, this instruction was given at petitioner's request. The instruction likely was important to the fact the jury hung up 9-3 for acquittal on that charge involving substantially the same material as here.

Goldstein v. Allain, 568 F. Supp. 1377 (N.D.Miss. 1983). Other courts, however, are in accord with the Arkansas position on this issue. *See, e.g., State v. Barrett*, 278 S.C. 92, 292 S.E.2d 590, 592 (1982); *Andrews v. State*, 652 S.W.2d 370 (Tex.Crim.App. 1983).

Since there is a split in the authorities, certiorari should be granted.

C.

While this may not be the time to discuss alternatives to *Miller*, one alternative could be suggested as a starting point:

The Attorney General's Commission on Pornography (1986) (the Meese Commission) divided pornographic materials into four groups according to their alleged harm to the recipient:

(1) sexually violent material;

(2) nonviolent materials depicting degradation, domination, subordination,

or humiliation;

(3) nonviolent and nondegrading materials; and

(4) nudity.

Even accepting the Commission's conclusions,[7] which we do not, it is reasonable to draw the line for what is constitutionally obscene to include: (a) the sexually violent which the majority of the Commissioners concluded (without much factual basis) incites sex crimes; (b) maybe nonviolent materials depicting degradation, domination, subordination, or humiliation[8]; (c) child pornography;

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[7] We do not accept the Commission's conclusions because of the flawed nature of the methodology of the report. *See, e.g.*, Donnerstein, Linz & Penrod, The Question of Pornography: Research Findings Policy Implications (1987). Since many persons do and since the Supreme Court followed the minority report of the President's Commission of Obscenity and Pornography (1970) in *Miller*, we at least discuss it.

[8] But, including that may even lead to vagueness problems.

New York v. Ferber, 458 U.S. 747 (1982); (d) dissemination to minors of any of the materials described by the Commission (since the interest in protecting minors reduces the vagueness problem as to them); *Ginsburg v. New York*, 390 U.S. 629 (1968); and (e) continued regulation of the airways as the FCC and Congress see fit since minors can tune into "offensive programs"; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Adopting this as a possible standard, we submit, would bring sensibility and even-handedness to obscenity prosecution, and it would substantially reduce the number of constitutional challenges to obscenity laws heard by the courts. Such a standard is clear to everyone and it eliminates virtually all subjectivity from obscenity laws. One would easily know whether the materials at issue vio-

late the obsenity laws without having to wonder what a particular jury will do on a particular day anywhere in the country. If may even be possible to formulate other standards. At any rate, some standard other than *Miller* has to be adopted, and it is now time to do so.

III.

THE ARKANSAS COURTS UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO PETITIONER TO PROVE THAT THE ALLEGEDLY OBSCENE MATERIALS SATISFIED COMMUNITY STANDARDS WITHOUT IMPOSING UPON THE STATE THE BURDEN OF PROVING THAT THE MATERIALS OFFENDED COMMUNITY STANDARDS.

In obscenity cases, the prosecution is not obliged under the First Amendment to put on proof of community standards to get its case to the jury. *Paris Adult*

Theatre I, supra, at 56 n.6. Under the rulings of the Arkansas courts in this case, this goes one step further: Not only does the State *not* have to prove community standards, but the *defendant* in an obscenity case is obligated to prove "acceptance" in the community (*i.e.*, "community standards" are not violated) as a threshold question in order to put on proof to show that the material does not appeal to the prurient interest under community standards.

The Arkansas courts held, in effect, that the State has no burden of producing evidence on the issue of community standards but the defendant does. This unconstitutionally shifts the burden of proof to the defendant in obscenity cases to prove that the material is not obscene. The holding of the Arkansas Supreme Court and the courts below that

"the materials placed into evidence (speak) for themselves" is contrary to the holdings of this Court that the due process clause of the Fourteenth Amendment requires the prosecution to prove every element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 702-03 & n.31 (1975).

The trial in an obscenity case is now such that, as here, the state puts on the offending materials and rests, and the burden shifts to the defendant to prove that the material at issue is not obscene. That is precisely what happened in state court, and that procedure violates due process. Certiorari should be granted to review this question.

C O N C L U S I O N

The Writ of Certiorari should be granted.

Respectfully submitted,

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A P P E N D I X

Affirmance of the Judgment of Conviction: *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d 155, *cert. denied*, 108 S. Ct. 155 (1987) A1

Denial of Petition for Writ of Habeas Corpus: *Dunlap v. Lockhart*, No. PB-C-88-194 (E.D. Ark. Oct. 21, 1988) A20

Affirmance of Denial of Petition for Writ of Habeas Corpus: *Dunlap v. Lockhart*, No. 88-2724 (8th Cir. Dec. 18, 1989) A38

APPENDIX

Allen DUNLAP d/b/a AMERICAN ARCADE v. STATE of Arkansas

CR 86-138

Supreme Court of Arkansas
Opinion delivered April 27, 1987

1. CONSTITUTIONAL LAW — OBSCENE SPEECH NOT PROTECTED BY FIRST AMENDMENT. — The protection of the First Amendment does not extend to obscene speech.
2. OBSCENITY — DEFINITION. — The United States Supreme Court has said that the guidelines for identifying obscenity are (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
3. OBSCENITY — "OBSCENE MATERIAL" — DEFINITION. — "Obscene material" is that which, taken as a whole and applying contemporary statewide standards, attempts to activate prurient interests.

4. OBSCENITY — ARKANSAS OBSCENITY STATUTES DRAFTED PURSUANT TO GUIDELINES ESTABLISHED BY THE UNITED STATES SUPREME COURT — SUFFICIENT GUIDELINES PROVIDED. — The Arkansas obscenity statute was drafted pursuant to the guidelines established by the United States Supreme Court and provide sufficient guidelines to law enforcement personnel to prevent arbitrary, discriminatory enforcement.
5. OBSCENITY — ARKANSAS STATUTE NOT VOID FOR VAGUENESS. — The Arkansas Legislature's phrasing of Ark. Stat. Ann. § 41-3585.1(4)(b), that obscene material means that material which, taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards, does not violate the standard established by the United States Supreme Court and, consequently, does not render the statute void for vagueness.
6. OBSCENITY — ARKANSAS DEFINITION OF "OBSCENE MATERIAL" NOT CIRCULAR. — The statutory definition of "obscene material," when read as a whole, is not circular.
7. EVIDENCE — EXPERT EVIDENCE — ADMISSIBILITY. — It is not error for the trial judge to fail to require expert evidence that materials were obscene when the materials themselves were placed in evidence, since the materials themselves are the best evidence of what they represent.
8. OBSCENITY — BURDEN OF PROOF ON STATE — SUFFICIENCY OF THE EVIDENCE. — The State met its burden of proof of obscenity by introducing the materials themselves; no separate proof of community standards was necessary.
9. OBSCENITY — BURDEN OF PROOF NOT SHIFTED TO DEFENDANT. — The defendant in an obscenity case was not required to prove that the materials introduced by the State were not obscene, nor was he required to prove community standards; the fact that he chose to offer such proof does not mean that the burden was shifted.
10. OBSCENITY — EVIDENCE THAT HARD-CORE PORNOGRAPHIC MATERIALS COULD BE PURCHASED AT OTHER LOCATIONS IN THE AREA PROPERLY EXCLUDED. — The proffered evidence that would have tended to prove that hard-core pornographic materials similar to that sold by the defendant could be purchased at other locations in the area was properly excluded, since the survey would not be representative of a statewide standard, as is required, and had no validity in methodology.
11. JURY INSTRUCTIONS — INSTRUCTION ON OBSCENE MATERIAL SUFFICIENT. — An instruction to the jurors that they were not to judge the allegedly obscene material on the basis of their personal opinions, but were to consider the material on the basis of a community

standard encompassing all levels of sensitivity, of religiousness and of economic, educational, and social standings, sufficiently covered the issue, and the trial court did not commit reversible error by refusing to give appellant's requested instruction on the same issue.

12. APPEAL & ERROR — FAILURE TO OBTAIN A RULING ON OBJECTION — EFFECT. — Where the appellant failed to get a ruling on his objection, he may not pursue the matter on appeal.

13. APPEAL & ERROR — FAILURE TO SHOW PREJUDICE — EFFECT. — The appellate court will not reverse where the appellant is unable to show that he was prejudiced in any manner.

Appeal from Pulaski Circuit Court, Fifth Division; *Jack Lessenberry*, Judge; affirmed.

John Wesley Hall, Jr., for appellant.

Steve Clark, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellee.

ROBERT H. DUDLEY, Justice. Appellant was convicted of promotion of obscene material under Ark. Stat. Ann. § 41-3585.2 (Supp. 1985). He argues five points of appeal, but since none of the points involves the sufficiency of the evidence, we need not recite the facts. We affirm the conviction.

Appellant's first point is that the material statute, § 41-3585.2, is void for vagueness under the Free Speech and Due Process provisions of the first and fourteenth amendments to the Constitution of the United States.

[1, 2] In *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985), the Supreme Court gave a concise review of its holdings and guidelines in the field of obscene materials.

> *Roth* [*Roth* v. *United States*, 354 U.S. 476 (1957)] held that the protection of the First Amendment did not extend to obscene speech, which was to be identified by inquiring "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.*, at 489 (footnote omitted). Earlier in its opinion, *id.*, at 487, n. 20, the Court had defined "material which deals with sex in a manner appealing to prurient interest" as:
>
> "*I.e.*, material having a tendency to excite lustful

thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines "prurient," in pertinent part, as follows:

"'. . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd . . .'"

"Pruriency is defined, in pertinent part, as follows:

"'. . . Quality of being prurient; lascivious desire or thought . . .'

"See also *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 242 (1915), where this Court said as to motion pictures: '. . . They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to* . . .' (Emphasis added.)

"We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957), *viz*:

"'. . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters . . .' See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*"

Under *Roth*, obscenity was equated with prurience and was not entitled to First Amendment protection. Nine years later, however, the decision in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), established a much more demanding three-part definition of obscenity, a definition

that was in turn modified in *Miller v. California*, 413 U.S. 15 (1973). The *Miller* guidelines for identifying obscenity are:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, [408 U.S. 229] at 230, quoting *Roth v. United States, supra*, [354 U.S.] at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24.

Miller thus retained, as had *Memoirs*, the *Roth* formulation as the first part of this test, without elaborating on or disagreeing with the definition of "prurient interest" contained in the *Roth* opinion.

The statute at issue was obviously drafted pursuant to the guidelines set out in *Miller* v. *California*, 413. U.S. 15 (1973). Appellant argues, however, that the *Miller* majority was slim; that the composition of the Supreme Court of the United States has changed since 1973; and that in the more recent case of *Kolender* v. *Lawson*, 461 U.S. 352 (1983), the Supreme Court has established a new vagueness analysis under which the critical inquiry is whether an allegedly vague statute encourages arbitrary, discriminatory enforcement by police, prosecutors, judges, and juries.

We recognize the difficulty in defining obscenity. In fact, barely more than a decade after the Supreme Court defined obscenity in *Roth* v. *United States*, 354 U.S. 476 (1957), Justice Harlan in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), stated "the subject of obscenity has produced a variety of views among members of the Court unmatched in any other course of constitutional adjudication. In the 13 obscenity cases [as of 1968] in which signed opinions were written, [there] has been a total of 55 separate opinions among the Justices." 390 U.S. at 704-5. True to form, in *New York* v. *Ferber*, 458 U.S. 747 (1983), there were four separate opinions. Although the Supreme Court has had

difficulty with the definition of obscenity, and even though the composition of the Supreme Court has changed, we are constrained to follow *Miller*. In addition, we are not convinced that the guidelines pronounced in *Miller*, and thus also our statutory definition of "obscene material," have been made constitutionally infirm by the opinion in *Kolender, supra*. In *Kolender*, which did not involve obscenity, the Court explained that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357. The Court noted that although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, it has recently recognized that the more important aspect of the doctrine is the requirement that a legislature establish minimal guidelines to govern law enforcement. Thus, even if the Court has recently focused more attention on the second phase of the analysis, it was nevertheless a consideration before *Kolender*. Further, even if we examine the statute with special emphasis on the question of whether it encourages arbitrary, discriminatory enforcement, we find that it does not. Our obscenity statutes provide sufficient guidelines to law enforcement personnel to prevent arbitrary, discriminatory enforcement.

Ark. Stat. Ann. § 41-3585.1(4) (Supp. 1985) defines "obscene material":

> (4) "Obscene material" means that material which:
>
> (a) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;
>
> (b) Taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards; and
>
> (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

Appellant argues that the statute is additionally void for vagueness because it uses the term "prurient interest of the average person" in subsection (4)(b) which is undefined in the

statute and which no longer has any substantive meaning. Appellant quotes several dictionary definitions of "prurient" from 1935 forward and argues that the more recent definitions do not contain "shamefulness" or "morbidness," but rather describe normal human responses which cannot be considered obscene; that the jury was instructed that " '[p]rurient interest' is a morbid, sick, or shameful interest in sex, as distinguished from a normal interest in sex"; that two defense witnesses, Dr. Stevens and Dr. Moneypenny, testified that "average persons" do not have "morbid, sick or shameful interests in sex"; that the term is thus vague and confusing and cannot provide notice; and, therefore, use of the term in our statute makes it void for vagueness. This argument is also without merit.

According to appellant's own history of Webster's definitions, the 1961 edition did not use the terms "shameful" or "morbid" in defining "prurient," yet in *Miller, supra*, which was decided in 1973, the Supreme Court used the term "prurient" in establishing guidelines for defining "obscenity." Further, the Court has continued to use the term "prurient interest" in discussing obscenity cases, and the definition of that term contained in the jury instruction in the instant case was tacitly approved by the Supreme Court as recently as 1985 in *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

Further, the term "appeal" is defined as follows:

> 1. An earnest or urgent request, entreaty, or supplication. 2. A resort or application to some higher authority, as for sanction, corroboration, or decision . . . 3. The power of attracting or of arousing interest . . .

The American Heritage Dictionary of the English Language 62 (1981).

[3] After examining our statute as a whole, we are convinced that the legislature intended for the word "appeals," in the following statutory definition of "obscene material," to have the first definition quoted above:

> (4) "Obscene material" means that material which:
>
> . . .
>
> (b) Taken as a whole, *appeals* to the prurient interest of the

> average person, applying contemporary statewide standards;

(Emphasis added.)

Thus, "obscene material" is that which, taken as a whole and applying contemporary statewide standards, *attempts* to activate prurient interests. The average person is quite capable of making that determination and whether or not the material is successful in doing so is beside the point.

[4, 5] As mentioned previously, our obscenity statute was obviously drafted pursuant to the guidelines established in *Miller*. The first of those guidelines is: "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . ." *Miller*, 413 U.S. at 24. At first blush, it might seem that the legislature had mistakenly transposed the words of the *Miller* guideline and, thereby, created a new concept by using the phrase "prurient interest of the average person." However, in *Hamling* v. *United States*, 418 U.S. 87, 128-30 (1974), the Supreme Court stated:

> Petitioners contend that the District Court's instruction was improper because it allowed the jury to measure the brochure by its appeal to the prurient interest not only of the average person but also of a clearly defined deviant group. Our decision in *Mishkin* v. *New York*, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 (1966), clearly indicates that in measuring the prurient appeal of allegedly obscene materials, *i.e.*, whether the "dominant theme of the material taken as a whole appeals to a prurient interest in sex," consideration may be given to the prurient appeal of the material to clearly defined deviant sexual groups. Petitioners appear to argue that if some of the material appeals to the prurient interest of sexual deviants while other parts appeal to the prurient interest of the average person, a general finding that the material appeals to a prurient interest in sex is somehow precluded.
>
> . . .
>
> The jury was instructed that it must find that the materials as a whole appealed generally to a prurient interest in sex.

In making that determination, the jury was properly instructed that it should measure the prurient appeal of the materials as to all groups. Such an instruction was also consistent with our recent decision in the *Miller* case. We stated in *Miller*:

> "As the Court made clear in *Mishkin v. New York*, 383 U.S., at 508-509 [16 L. Ed. 2d 56], the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, *so far as material is not aimed at a deviant group*, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person — or indeed a totally insensitive one." 413 U.S., at 33, 37 L. Ed. 2d 419 (emphasis added).

The legislature's phrasing of subsection (4)(b) does not violate the standard established in *Miller* and further explained in *Hamling*. Consequently, it does not render the statute void for vagueness.

[6] Appellant's final vagueness argument is that the statute uses a circular definition which ordinary persons cannot understand in defining "obscene material." He argues that the result of the circularity is that, in effect, our statute defines "obscene material" as a patently offensive depiction done in a patently offensive manner. This argument is also without merit and requires little discussion. Again, Ark. Stat. Ann. § 41-3585.1 (Supp. 1985) provides the following definition of "obscene material":

> (4) "Obscene material" means that material which:
>
> (a) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;
>
> . . .

"Sadomasochistic abuse," "sexual conduct," and "hard-core sexual conduct" are all defined in the same statute as follows:

> (2) "Hard-core sexual conduct" means patently offensive

acts, exhibitions, representations, depictions, or descriptions of:

(a) Intrusions, however slight, actual or simulated, by any object, any part of an animal's body, or any part of a person's body into the genital or anal openings of any person's body.

(b) Cunnilingus, fellatio, anilingus, bestiality, lewd exhibitions of the genitals, or excretory functions, actual or simulated.

. . .

(8) "Sadomasochistic abuse" means flagellation, mutilation, or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed, in a sexual context.

(9) "Sexual conduct" means human masturbation or sexual intercourse.

The statutory definition read as a whole, and not as appellant has abbreviated it, is simply not circular.

Appellant's second point of appeal also contains subpoints. He argues that the trial court erred in barring him from presenting evidence of the general availability of sexually explicit adult materials in the Little Rock metropolitan area at the time of the alleged offense as evidence of tolerance of the material or of community standards. He further argues that the trial court thereby shifted to him the burden of proving community standards which violated the due process clause. The arguments have no merit.

Appellant proffered testimony that several commercial sources of material similar to that in question were "fairly busy" when visited by the witness. All of the commercial sources were located in the Little Rock metropolitan area. The trial court ruled that the testimony was not admissible. The ruling was correct for a number of reasons.

[7] In *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), decided on the same day as *Miller, supra*, the Court held that it

was not error for the trial judge "to fail to require" expert evidence that the materials were obscene when the materials themselves were placed in evidence. "The films, obviously, are the best evidence of what they represent." 413 U.S. at 56. Footnote 6 to the foregoing sentence provides in pertinent part:

> This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. 2 J. Wigmore, Evidence §§ 556, 559 (3d ed.) (1940). No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. *See United States* v. *Groner*, 479 F.2d —, — (slip opinion, at 19-20) (1973); *id.*, — (slip opinion, pp. 24-25) (Ainsworth, J., concurring). "Simply stated, hard core pornography . . . can and does speak for itself." *United States* v. *Wild*, 422 F.2d, at 34, 36 (CA2 1970), cert. denied, 402 U.S. 986, 29 L.Ed. 2d 152, 91 S. Ct. 1644 (1971).

[8, 9] Here, the State met its burden of proof of obscenity by introducing the materials themselves. No separate proof of community standards was necessary. Appellant was not required to prove that the materials were not obscene, nor was he required to prove community standards. The fact that he chose to offer such proof does not mean that the burden was shifted.

[10] The trial judge ruled correctly in excluding the proffered evidence. The proffered evidence would have tended to prove only that similar hard-core pornographic materials could be purchased at other locations in the Little Rock area.

[11] As set out in J. Monahan and L. Walker, *Social Science in Law: Cases and Materials* 118 (1984): "Surveys of the jurisdiction in which prosecution is initiated, employing the specific magazine or film implicated in the charge, are frequently commissioned in obscenity cases. Usually, but not always, they are commissioned by the defense. Their admissibility is a function of the validity of the researcher's methodology." Here, as in *United States* v. *Boltansky*, 346 F. Supp. 272 (D.C. Md. 1972), the trial court found that the survey was unrepresentative of the

community standard, and that it would be more confusing than probative in determining whether the material was obscene. The ruling was correct because the availability of similar illicit material would not necessarily show acceptance of the material. *Hamling* v. *United States*, 418 U.S. 87, 125-26 (1974). Even if availability did in some manner demonstrate acceptability, a survey of nine establishments selling obscene materials in the state's most urban area would not be representative of a statewide standard, as is required. *See* Ark. Stat. Ann. § 41-3585.1(4)(b) (Supp. 1985). We do not reverse a trial court's ruling on the admissibility of evidence unless there is a clear abuse of discretion. The survey had no validity in methodology. *David* v. *State*, 286 Ark. 205, 691 S.W.2d 133 (1985). There was no abuse of discretion in excluding the evidence.

Appellant's third allegation of error is that the trial court wrongly refused to permit him to prove that community standards would tolerate the materials which he promoted; the court wrongly refused to permit him to argue the point to the jury; and, the court wrongly denied his proffered instruction on the issue. Again, the arguments are without merit.

Appellant renews his argument that he should have been allowed to put on proof of the availability of obscene materials at other places in the Little Rock area as evidence that community standards would tolerate the materials. The evidence was not admissible for the reasons previously stated. Since the proffered evidence was not admitted, the trial court ruled correctly in refusing to allow argument about that evidence.

The trial court instructed the jurors that they were not to judge the allegedly obscene material on the basis of their personal opinions, but were to consider the material on the basis of a community standard encompassing all levels of sensitivity, of religiousness and of economic, educational, and social standings. This instruction sufficiently covered the issue and the trial court did not commit reversible error by refusing to give appellant's requested instruction on the same issue. *Henderson* v. *State*, 284 Ark. 493, 684 S.W.2d 231 (1985).

Appellant next argues that the trial court erred in refusing to let him put on evidence of the context in which the material was sold, in refusing to let him argue about the context of the sales,

and in refusing to instruct the jury on the use of context as a factor in determining the community standard. Appellant does not specify a particular evidentiary ruling which he contends is erroneous. He only states: "Appellant made several attempts to put into evidence the context of the dissemination of the material as bearing on the issue of obscenity. The State did not object to some of it, but it did object to quite a bit pertaining to the context of dissemination and to closing argument on that issue and the trial court sustained those objections."

On direct examination of one of his witnesses, appellant put into evidence a large photograph of his business building which shows a sign on the front door that provides "Members Only." His attorney called a police detective to the witness stand and on direct examination elicited the following:

Q. And when you come up outside, it has a sign that's — That tells you it's an adult establishment?

A. Yes, sir.

Q. So you're aware of that going in?

A. That's correct.

Q. Did you ever become a member of that club when you went in to buy the evidence?

A. Yes. I had to purchase a membership before I was allowed access into the club.

Five pages of transcript later the following question and answer took place:

Q. And there's a sign that tells you that you have to be eighteen to get in?

A. Yes, sir.

After the above answer was completed, the State objected. A lengthy dialogue (four pages of transcript) between the attorneys and the court took place, and the court ultimately sustained the objection but did not strike the answer. Appellant made no offer of proof on any additional "contextual" material.

Since appellant did not tell us which ruling relating to the context of promotion of materials he thinks is erroneous, we can

only assume it is the one set out above. In it, the question was answered before an objection was made, so appellant could not possibly have suffered any prejudice, even if the subsequent ruling had been erroneous. In fact, the trial court later asked the prosecutor why he was making an issue over the matter since it was already in evidence.

Appellant argues that the trial court erred in prohibiting him from arguing about the context of the rule. However, he does not set out such a ruling, and we do not find one in the abstract. The colloquy on the subject which we find in the abstract is as follows:

> BY THE COURT: Why do we need to get into it a great deal more?
>
> BY MR. HALL [Appellant's Attorney]: Because I can argue to the jury, I believe, that they can determine the community standards based on the context in which this material was disseminated. That is, an adult establishment, limited solely to adults. Nobody was forced to come in off the street in there. [A]nd the State's offered jury instruction even refers to the average adult in the community.
>
> BY THE COURT: It doesn't say anything about minors in there whatsoever. You can argue that just as well. There's no dispute as to all of that . . .

Appellant next argues that the trial court erred in refusing his proposed instruction on the subject of context. The trial judge ruled that the proposed instruction misstated the law, conflicted with other instructions, and would confuse the jury. The proposed instruction would have told the jury that the test of obscenity is whether the material was offensive to the clientele of appellant's store. Such an instruction would have constituted a misstatement of the law because the test is not whether appellant's clientele finds the material to be obscene, but rather whether the average person finds that the material appeals only to the prurient interest.

Appellant's final point of appeal is that the trial court erred in not sustaining his objection to comments made by the prosecutor in closing argument. The argument has no merit.

[12] During appellant's closing argument, his attorney stated that the case involved "prosecution for an idea." In the State's closing argument the deputy prosecutor responded:

> Now, I like Mr. Hall's representation that this is an idea.
>
> . . .
>
> The thing that really offended me about — Most about Mr. Hall is the freedom of choice. That this is an idea. And that somehow, that I'm trompling on ideas here. Ladies and gentlemen, there's many ideas in our society that we simply cannot tolerate. We have to have laws to prohibit those types of ideas. We — The fact that somebody may think that overthrowing the government of the United States, and setting up a dictatorship — That's an idea. But we've got to stop it, because it's wrong. And it's a decline in our community that we cannot tolerate.

Appellant objected, arguing that the law does not prohibit ideas but rather the conduct which furthers certain ideas. In response to appellant's objection, the trial court merely stated that, "I'm not going to talk about this. I'm going to let the jury decide this case on the instructions I've given you." Appellant did not pursue the matter and thus failed to get a ruling on his objection. He may not now pursue the matter on appeal. *Williams* v. *State*, 289 Ark. 69, 709 S.W.2d 80 (1986).

[13] Even if we considered the court's statement to be the same as "objection overruled," we would not reverse because appellant is unable to show that he was prejudiced in any manner. *See Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984). The trial court's instructions made clear the elements of the charged offense and that counsel's arguments were not evidence. The jury is presumed to follow the court's instructions. *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982). There is simply no reason for us to hold that the jury thought it was to convict appellant because of his "ideas" about pornography.

Affirmed.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I respectfully dissent. It is my opinion that Ark. Stat. Ann. § 41-3585.1—.2 (Supp. 1985)

is void for vagueness and amounts to the denial of due process and free speech. The statute does not define "obscene" in such terms as to give fair notice that sale or distribution of such materials is a violation of state law. The definition of "obscenity" has escaped definition; "obscenity" remains a rather amorphous concept until it is "defined" by a conviction.

Neither the statute nor our decisions have been able to define "obscenity" until after an arrest and conviction, and then it's too late. Our present statute is an obvious attempt to codify the definition found in *Miller* v. *California*, 413 U.S. 15 (1973). However, the statute failed in its attempt; instead the legislature enacted a statute that is so vague and uncertain as to practically require enforcement officers to act in a discriminatory and arbitrary manner in selecting arrestees. For example, § 41-3585.1(4)(b) describes "obscene material" as material which: "Taken as a whole appeals to the prurient interest of the average person, applying contemporary statewide standards . . ."

The *Miller* opinion states that:

> The basic guidelines for the trier of facts must be: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interests; (b) whether the work depicts or describes, in a patently offensive way sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Obviously even the drafters of the statute here in question did not know the meaning of the word "prurient." As used in the statute, the average person has a "prurient" interest. The *Miller* case did not so state.

Admittedly, I do not know the meaning of the word "prurient" and certainly cannot tell from our statute what it means. The average person should be able to read a law and understand what is prohibited before the act is done. Certainly this Court should be able to determine what will violate the law before reviewing the evidence. We cannot take this statute and give the words their plain meaning and define exactly what conduct is permitted and what conduct is prohibited.

The majority opinion takes several quotes from *Brockett* v. *Spokane Arcades, Inc.* 472 U.S. 491 (1985) as the basis for the decision. The first is an attempt to explain the holding in *Roth* v. *United States*, 354 U.S. 476 (1957), which defines prurient as "i.e., material having a tendency to excite lustful thoughts." The opinion then cites Webster's New International Dictionary indicating that "prurient" means: "Itching, longing, uneasy with desire or longing; of persons having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd . . ." The best quote of all is: "pruriency is defined, in pertinent part as follows: '. . . quality of being prurient . . . '"

It seems to me that the statute and the precedent cited by the majority opinion are attempts to curb the thoughts of the average person. The first thing wrong with the statute is that it attempts to legislate statewide standards on obscenity and even goes so far as to prohibit cities from enacting contrary laws. Neither *Miller* nor any other case attempts to set *statewide* standards. Furthermore, *Miller* required contemporary community standards. The Arkansas statute makes no attempt to define "contemporary" or "community" standards, but instead attempts to set "statewide" contemporary standards anchored on a 1973 opinion.

The Arkansas statute is without doubt a laudable, but futile, attempt to control the sale and distribution of material which the average person in the state might consider indecent and immoral. However, instead of coming right out and stating what was prohibited in plain language, the legislature became entangled in a mass of conflicting statutes, opinions and ideas and enacted an impossible statute. There is a maxim that morals cannot be legislated. Neither can the minds of man be controlled. This attempt to do so must fail.

Nudity, sex, lust, desire and related topics have been present as long as man has existed. All of them are normal to humans. Laws cannot extinguish the thoughts and desires of man. Traffic in obscenity cannot exist without willing customers. None of the material was shown publicly nor was any person required to view it.

The majority quotes (4)(a) three or four times with a different meaning each time. The different meaning of words and acts is primarily what makes it near impossible to define an

appropriate statute warning people of what will and will not be allowed. No statute that I have read has defined "obscenity" in such terms as to notify the average person of what acts will violate the law. The definitions of obscenity will be different in the opinion of everyone attempting to define it.

The majority opinion is typified in the statement: "[I]t was not error for the trial judge to fail to require expert evidence that the materials were obscene when the materials themselves were placed in evidence." What more proof is needed to reveal that this is a case of not knowing how to define it or what it is "until we see it." The opinion goes on to state that the materials are the "best evidence of what they represent." The opinion is bottomed upon the statement: "*Here the state met its burden of proof of obscenity by introducing the materials themselves*" (emphasis added). The opinion continues by stating: "No separate proof of community standards was necessary." This completely ignores the *Miller* holding and is in fact contrary to the criteria stated in *Miller*. The net effect of the majority opinion is that "obscenity" cannot be defined but becomes apparent when the materials are presented to a trier of fact or to an appellate court. As the opinion states, the appellant was not required to prove that the materials were not obscene, but neither was the state required to prove the materials were obscene.

To be valid a statute must provide fair notice to dealers of newspapers, magazines, movies, video tapes and other methods for the exchange of ideas, that sale or distribution of such materials may bring prosecution. Justice Brennan, dissenting in *Miller*, stated: "[A]fter sixteen years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas [on obscenity], including the one announced today, can reduce the vagueness to a tolerable level . . ."

I think the trial court here wrongly refused to allow proof of community standards. Availability of the same materials at many other retail and wholesale outlets in Pulaski County was, in my opinion, relevant and material. Acceptability is one criterion to be considered when trying to determine what constitutes obscenity. No reason is given for selection of the defendant for prosecution for doing that which others may continue to do. Apparently the legislature intended to "set a net large enough to

catch all *possible* offenders" and leave it to the prosecuting authorities to step in and select those who will be detained and punished. If this was the intent of the legislature, then it has been successful. The statute as it is written leaves the police and prosecutor in a position to proceed discriminately against persons or groups who incur disfavor. What is obscene to one policeman or prosecutor may not be obscene to another policeman or prosecutor. We should not invite arbitrary or erratic law enforcement. The trial court refused to allow evidence of tolerance in the community unless it was first shown that such materials were acceptable. Tolerance is quite different from acceptance, which connotes approval. The Court thus created an impossible and improper burden for the appellant.

Censorship violates the mandates of the First Amendment to the Constitution of the United States. There *are* limitations to the guarantee of free speech. However, such limitations are not relevant to the present situation. It is my opinion that Ark. Stat. Ann. § 41-3585.1—.2 is an impermissible intrusion into the right of freedom of speech and freedom of the press. However offensive the materials may be to some people, they may be completely acceptable to others. Since the trial court prohibited proof of tolerance in the community, we do not know how acceptable such materials may be to the community. Therefore, even if the statute is constitutional, the case should be remanded to allow proof on the question of whether these materials are considered obscene by state or community standards.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

ALLEN DUNLAP PETITIONER

V. No. PB-C-88-194

A.L. LOCKHART, Director, Arkansas Department of Correction; CARROL GRAVETT, Pulaski County Sheriff; STEVE CLARK, Attorney General of Arkansas RESPONDENTS

MEMORANDUM AND ORDER

Now before the Court is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 from Allen Dunlap. On January 30, 1986, a Pulaski County jury convicted petitioner of promoting obscene materials, a violation of Ark. Code Ann. §§ 5-68-302-303. Petitioner was sentenced to a six-month term of imprisonment and fined $5,000.00.

On appeal to the Arkansas Supreme Court, the conviction was affirmed. *Dunlap v. State*, 292 Ark. 51, 728 S.W.2d

155 (1987). Petitioner subsequently sought a writ of certiorari from the United States Supreme Court. The writ of certiorari was denied. *Dunlap v. Arkansas*, 108 S. Ct. 155 (1987).

Petitioner requested that this Court stay his imprisonment pending the consideration of this petition, reasoning that the six-month sentence could be completed before the petition was decided, thus rendering the petition moot. The Court, in its Order dated April 28, 1988, granted petitioner's motion to stay incarceration pending a final resolution of the petition for writ of habeas corpus. Even though petitioner is not presently incarcerated, respondent conceded that petitioner is in custody pursuant to 28 U.S.C. § 2254(a) and, therefore, the petition is properly before the Court. Respondent also concedes that petitioner

has exhausted his available state remedies as required by 28 U.S.C. § 2254.

We turn now to the five grounds raised by petitioner.

First, petitioner contends that the Arkansas statute under which he was convicted is void for vagueness under the free speech and due process provisions of the United States Constitution because it fails to give adequate notice of what is "obscene" or fails to provide guidelines to law enforcement authorities to prevent enforcement of the law in an arbitrary and discriminatory manner. We look first to the statute to see if adequate notice is given of what is "obscene." Ark. Code Ann. § 5-68-302(4) defines obscene material as follows:

> (4) "Obscene material" means that material which:
>
> (A) Depicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or hard-core sexual conduct;

(B) Taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards; and

(C) Taken as a whole, lacks serious literary, artistic, political, or scientific value; . . .

The Arkansas statute is obviously based upon the United States Supreme Court's definition of obscenity set forth in *Miller v. California*, 413 U.S. 15, 24 (1973), as follows:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, [citations omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The *Miller* decision focused on the long-standing difficulty the Court had experienced in delineating what constitutes obscene material subject to regulation by the police power of the state. The def-

inition advanced by the *Miller* Court has been criticized and questioned many times since 1973. A recent sample of the criticisms of the *Miller* definition is found in the concurring and dissenting opinions in *Pope v. Illinois*, 107 S. Ct. 1918 (1987). However, the definition of obscenity found in *Miller* has not been overruled by a majority of the Court, and we are thus clearly bound to adhere to *Miller*. We find that the Arkansas statutory definition of obscene material is not unconstitutionally vague. Petitioner contends that attitudes toward sexually explicit materials have changed since the *Miller* decision and that sexually explicit materials "have achieved a widespread level of acceptability." (Petition at 11). As a result, petitioner argues, the *Miller* test for obscenity is no longer workable. We disagree. *Miller*, upon

which the Arkansas statute is based, is precedent that the state may, within limits, regulate certain material. If the state's regulation falls within the limits prescribed in *Miller*, then adequate notice of the prohibited materials is given. "We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Id.*, at 27. Petitioner's assertions that attitudes have changed since *Miller* and that availability of sexually explicit materials has increased are not facts in evidence in this case according to the record before us.

Petitioner argues, based upon *Kolender v. Lawson*, 461 U.S. 352 (1983), that the Arkansas statute is void for vagueness in that it fails to provide guidelines to

enforcement authorities to prevent enforcement in an arbitrary and discriminatory manner. *Kolender* involved a challenge to a California criminal statute which required persons who loiter on the streets to provide a "credible and reliable" identification and to account for their presence when stopped by a peace officer. The statute was struck down as unconstitutionally vague for failing to clarify exactly what is meant by a "credible and reliable" identification. Without such clarification, the statute provided no information to a suspect of how the suspect could satisfy the statute's requirement to offer a "credible and reliable" identification. Thus, each peace officer stopping a suspect under the statute had "virtually complete discretion" to determine if the statute's requirement had been met. *Id.*, at 358.

Petitioner argues that the prosecuting attorney is vested with similar standardless discretion in determining who to prosecute under the Arkansas statute prohibiting the promotion of obscene materials. We do not agree. First, the *Kolender* statute, itself, did not define what type of identification was required. The California Court of Appeal construed the statute to require a "credible and reliable" identification. The Arkansas statute, in contrast, specifically defines obscene material, and any prosecution for promotion of obscene material must be based upon the standard found within the statute. We find this to be quite unlike the California statute, where the prosecutor and peace officers were left to define a "credible and reliable" identification.

Petitioner concedes, in a sense, that

the statute provides guidance for Arkansas prosecutors. He contends, however, that the guidance in the statue is not meaningful due to "the inexorable process of social evolution," or the changes which have occurred since 1973. Petition at 12. Because of these alleged social changes, police and prosecutors are necessarily acting in a subjective manner when anyone is prosecuted for violation of the Arkansas statute, according to petitioner. We again find that the record does not support petitioner's allegation of a society which has so changed from 1973 that the *Miller* definition is rendered meaningless. We further find the Arkansas statute, which contains specific definitions of the proscribed behavior, to be distinguishable from the California statute at issue in *Kolender*.

In summary, we find that the Arkansas

statute under which petitioner was convicted is not void for vagueness based upon its lack of notice of the meaning of "obscene" or because it fails to provide guidelines to avoid arbitrary and subjective enforcement.

The second ground petitioner raises alleges that the Arkansas statute is void for vagueness in that the phrase "prurient interest" is undefined in the statute and no longer has any substantive meaning. Initially, we note that the lack of a statutory definition of "prurient" or "prurient interest" is not fatal to the statute. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1026 (9th Cir. 1981). *See also, Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, n.13 (1985). Further, the jury was instructed that prurient interest meant a "morbid, sick or shameful interest in sex, as distin-

guished from a normal interest in sex." We find this instruction to accurately embody the judicially accepted definition of "prurient."[1] Petitioner contends that the phrase "prurient interest" no longer

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[1] The beginning point for a case law discussion of the definition of prurient is *Roth v. United States*, 354 U.S. 476 (1956), where the Court noted:

> We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.O., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957), *viz.*:
>
> ". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ."

Id., at 487, n.20. The *Roth* definition of prurient interest was recently approved by the Supreme Court in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985). The *Brockett* opinion notes that, despite opportunities such as in *Miller v. California*, 413 U.S. 15 (1973), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the Court has specifically chosen not to disagree with the *Roth* definition of "prurient interest." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 497-98 (1985).

has any substantive meaning and cites the Court to *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984). We find the petitioner's reliance on this case to be misplaced. In discussing previous definitions, the Ninth Circuit Court of Appeals states: "We agree with these decisions and reaffirm that, under the first prong of the *Miller* test, a 'prurient interest' is 'a shameful or morbid interest in nudity, sex or excretion.'" *Id.*, at 491. We find petitioner's second ground for relief to be without merit.

Petitioner, for his third ground, contends that the Arkansas statute under which he was convicted is unconstitutional under the standards of *Miller v. California*, 413 U.S. 15 (1973). Petitioner alleges two deficiencies of the Arkansas statute. First, he contends that *Miller*

requires in its first prong that "the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest." The Arkansas statute refers to material which, "taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards." Ark. Code Ann. § 5-68-302(4)(B). Petitioner contends that the Arkansas legislature failed to follow the *Miller* language because an average person has no prurient interest in sex. We do not agree that the Arkansas Statute has missed the mark with the language of the statute. As the *Miller* Court stated:

> [T]he primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, *so far as material is not aimed at a deviant group*, it will be judged by its impact on an average person, rather than a particularly susceptible

or sensitive person--or indeed a totally insensitive one."

413 U.S., at 33, quoting *Mishkin v. New York*, 383 U.S. at 508-09 (emphasis in original).

While we concede that the *Miller* language and the Arkansas statute are not precisely identical, we find that the meaning of the Arkansas statute is substantially the same as that envisioned by *Miller* and the statute is not void for vagueness on this basis. While petitioner elicited testimony from two expert witnesses[2] that it was their opinion that the average person does not have a prurient interest, petitioner cites no case holding that average people cannot have a

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[2] We note that expert testimony is not necessary in order for the jury to determine the obscenity of materials placed into evidence. *Hamling v. United States*, 418 U.S. 87, 100 (1973). *See also, Paris Adult Theatre I v. Slaton*, 413 U.S. 49, at 56, n.6 (1973).

prurient interest in sex.

Petitioner also contends that the statute is unconstitutional under *Miller* due to a circular definition of obscene materials. Petitioner reads the definition of "obscene material" to be "patently offensive depiction done in a patently offensive manner." The statute reads otherwise. Utilizing the statutory definitions of "obscene material" and "hardcore sexual conduct," both of which are found in Ark. Code Ann. § 5-68-302, the definition is as follows:

> "Obscene material" means that material which [d]epicts or describes in a patently offensive manner sadomasochistic abuse, sexual conduct, or patently offensive acts, exhibitions, representations, depictions, or descriptions of:
>
> (A) Intrusions, however slight, actual or simulated, by any object, any part of an animal's body, or any part of a person's body into the genital or anal openings of any person's body; or
>
> (B) Cunnilingus, fellatio, anilingus, bestiality, lewd exhibitions of genitals, or excretory functions, actual or simulated; . . . .

While the phrase "patently offensive" is used twice within the paragraph, we find the definition, when read in its entirety, to be specific and understandable. The Arkansas statute is not void for vagueness due to its definition of "obscene materials."

In summary, we find meritless petitioner's argument that the Arkansas statute is unconstitutionally vague due to its definition, or lack thereof, of "prurient" or due to its definition of "obscene material."

For his fourth ground for relief, petitioner contends that the *Miller* standard for obscenity cases should now be reconsidered. We have noted that *Miller* is often criticized. Perhaps a reconsideration of *Miller* is on the horizon. However, the United States Supreme Court denied the petition for certiorari in this

case. *Dunlap v. Arkansas*, 108 S. Ct. 455 (1987). Until *Miller* is overruled or construed in a different manner, we are bound to follow the case. It is inappropriate for this Court to reconsider the United States Supreme Court's ruling in *Miller*. Petitioner's final ground for relief is that the trial court shifted the burden of proof to petitioner to prove that the materials satisfied community standards, when the state had the burden to prove that the prosecuted materials offended community standards. We find no merit in this argument. The prosecution introduced the materials into evidence. . The jury was then able, applying contemporary statewide standards, to determine if the materials were obscene. This is in line with the Supreme Court's decision in *Ginzburg v. United States*, 383 U.S. 463, 465 (1965). "In the cases

in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question." The materials placed into evidence spoke for themselves. Petitioner was not saddled with the burden of showing them not to be obscene, nor was he required to prove community standards.

In summary, we find that petitioner has failed to raise any ground upon which relief should be granted. Therefore, the petition for writ of habeas corpus is dismissed, and the relief sought is denied.

IT IS SO ORDERED this 21st day of October, 1988.

/s/ George Howard, Jr.
U. S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2724

Allen Dunlap,)
)
Appellant,)
)
v.)
)
A. L. Lockhart, Director,)
Arkansas Department of)
Correction, Carrol Gravett,)
Pulaski County Sheriff; Steve)
Clark, Attorney General of)
Arkansas,)
)
Appellees,)
)
Citizens for Decency through)
Law, Inc.,)
)
Amicus Curiae.)

Appeal from the United
States District Court for
the Eastern District of
Arkansas.

Submitted: November 15, 1989

Filed: December 18, 1989

Before FAGG, Circuit Judge, FLOYD R. GIBSON, and BRIGHT, Senior Circuit Judges.

PER CURIAM.

Allen Dunlap appeals the district court's dismissal of his 28 U.S.C. § 2254 petition for writ of habeas corpus. We affirm.

Dunlap was convicted in state court of promoting obscene materials. *See* Ark. Stat. Ann. §§ 5-68-302, 303 (1987). Dunlap concedes the materials in question are not entitled to first amendment protection under the standards established in *Miller v. California*, 413 U.S. 15, 24 (1973).

On appeal, Dunlap contends the charging statutes do not conform with the first amendment safeguards pronounced in *Miller*. Dunlap also invites this court to

redefine the standards that must be used to identify obscene materials for first amendment purposes, an invitation we promptly decline. *See Rodriguez De Quijas v. Shearson/American Express*, 109 S. Ct. 1917, 1921-22 (1989) (Supreme Court decisions are binding on the courts of appeals).

Having thoroughly reviewed the analysis and decision of the district court and the briefs, record, and arguments of the parties, we conclude the district court's decision is clearly correct. Thus, we affirm for the reasons stated in the district court's order. *See* 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.